No. 97-428

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,
Petitioner,

v.

ROBERT A. MILLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In a series of decisions, this Court first established a right of union-represented employees who are not members to prevent union expenditures of their contractually-required agency fees for purposes unrelated to collective bargaining over the employee's objection; and, then defined a procedure by which unions can vindicate this nonmember right. This procedure, which is drawn from the substantive law governing agency shop relationships and crafted to further the purposes of that legal regime, has a two-fold office: preventing objecting fee payers from being compelled to subsidize noncollective bargaining activities; and, at the same time, allowing unions to fairly spread the costs of collective bargaining among all represented employees, including the objectors.

One aspect of the procedural requirements defined by this Court is the provision by the union of an expeditious process whereby the objecting fee payers can promptly challenge the union's calculation of his fee reduction before an impartial decisionmaker, while the amount reasonably in dispute is held in escrow. The question presented by this case is whether an objecting nonmember can bypass the impartial-decisionmaker/escrow stage of the procedure and challenge the union's calculation by filing suit in federal court. The court of appeals answered that question "yes;" it is our submission that the correct answer is "no."

The set of union objection procedure rules this Court has established can accomplish its purposes only by operating as a coherent whole. In contrast, allowing the procedure to be pretermitted at the objector's option, as does the court of appeals' decision, undermines those purposes.

By reason of the procedure's structure an ddesign, no objector can be compelled to finance any nonchargeabe union activities before the procedure has run its course. That being so, no objector can claim that he has been compelled to subsidize such activities before the terminal challenge phase of the procedure is concluded. As a result, permitting an objector to challenge the fee calculation in court before that point is to permit premature and unnecessary litigation. Allowing an objector to short-circuit the procedure and bring his challenge to court before the impartial decisionmaker has been allowed to consider and pass upon the fee dispute, moreover, encroaches upon the interest of the union in being able to promptly deploy agency fee receipts for collective bargaining purposes in a manner that spreads the costs of collective bargaining equally among all represented employees.

ARGUMENT

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986), "outlined a minimum set of procedures by which a union in an agency-shop relationship could meet its requirement[s]" with regard to agency fees paid by nonmembers who object to financing union activities that are not germane to collective bargaining. *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990).

The court of appeals in this case treated one of these procedural requirements—the provision by the union of "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," *Hudson*, 475 U.S. at 310—as a mere option for the sole benefit of objectors with a preference for prompt decisionmaking.

That, we submit, is to misunderstand *Hudson* and the office of the *Hudson* procedures. Those procedures are *not* drawn from some abstract notion of procedural due process (although the procedures do, of course, satisfy due process). Rather, *Hudson* sets out a carefully balanced set of rules drawn from the *substantive* law governing the agency-shop relationship whose office is to "prevent[] compulsory subsidization of ideological activity by employees who object thereto *without* restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302 (emphasis added), quoting *Abood v. Detroit Board of Educaiton*, 431 U.S. 209, 237 (1977).

The *Hudson* rules protect the objecting fee payers' interests by providing that the union is to: (i) promptly calculate the proportion of total union expenditures that support its collective bargaining function; (ii) reduce the objectors' fees accordingly; (iii) provide the objectors with an explanation of the basis for the union calculation of the reduced fee; (iv) provide the objectors the opportunity to challenge the fee reduction calculation before an impartial decisionmaker in an expeditious process; and (v) escrow the portion of the objectors' fees that is reasonably put in dispute by such a challenge.[1]

Equally to the point, the *Hudson* rules are framed in such a way as to minimize the interference with the union's ability to apply, with reasonable promptness, the objectors' agency fee payments to the support of the union's collective bargaining function.

This set of rules can accomplish its salutory purposes only by operating as a coherent and complete whole and can only fail of those purposes if the final "challenge" stage of the procedure can, as the court of appeals believed, be pretermitted at the objector's option.

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[1] *Abrams v. Communications Workers*, 59 F.3d 1373, 1376 (D.C. Cir. 1995), details the operation of one union objection procedure conforming to the *Hudson* requirements. Under the procedure in that case, the union "informs nonmembers of their right to object by a notice distributed yearly to all employees." *Id.* Nonmembers may then file objections up to a cut-off date just before the union's "fee year" begins. *Id.* "At the beginning of the fee year an objector receives from the Union an 'advance reduction' payment equal to the amount attributable to nonchargeable expenditures that will be deducted from his paychecks during the coming year." *Id.* "The amount of the advance reduction payment is calculated by an outside accounting firm" based on the union's expenditures "during the preceding year." *Id.* "Along with the payment the Union provides a detailed accounting of its expenses and a description of the expenses it considers chargeable and nonchargeable." *Id.* "Any employee who challenges the amount of the advance reduction . . . is then referred to arbitration." *Id.*

In the argument that follows we retrace the decisional path that begins with *Machinists v. Street*, 367 U.S. 740 (1961), and place *Hudson* in its proper legal context, to show that the court of appeals' approach does not give full scope of the *Hudson* procedures or full credit to *Hudson's* underlying rationale.

1. Section 2, Eleventh of the Railway Labor Act (RLA) permits carriers and labor organizations covered by that Act "to make agreements, requiring as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class" to the extent of "tender[ing] the periodic dues, initiation fees, and assessments . . . uniformly required as a condition of acquiring or retaining membership." 45 U.S.C. § 152, Eleventh (a).

In *Railway Employes' Dept. v. Hanson*, 351 U.S. 235 (1953), the Court, in a holding premised on the stated understanding that "[t]he financial support required relates . . . to the work of the union in the realm of collective bargaining," *id.* at 235, concluded that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of congress under the Commerce Clause and does not violate either the First or the Fifth Amendments," *id.* at 238.

The Court was presented with the same kind of constitutional challenge in *Machinists v. Street, supra*, this time on a fuller record of the nature of the union's expenditures. And, *Street* avoided the constitutional issue reserved in *Hanson* by its holding "that § 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes." *Communications Workers v. Beck*, 487 U.S. 735, 745 (1988).

As the *Street* Court stressed—and as the Court has repeatedly stressed since—the objecting fee payers' "griev-

ance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds." 367 U.S. at 771.[2]

At the same time, the Court has warned that "restraining collection of funds . . . might well interfere with the . . . unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry." *Street*, 367 U.S. at 771. Elaborating on this point, the Court explained:

> The complete shutoff of this source of income defeats the congressional plan to have all employees benefited share costs "in the realm of collective bargaining," *Hanson*, 351 U.S. at p. 235, and threatens the basic congressional policy of the Railway Labor Act for self-adjustments between effective carrier organizations and effective labor organizations. [367 U.S. at 772.]

The Court, therefore, concluded that "an injunction restraining enforcement of the union-shop agreement is . . . plainly not a remedy appropriate to the violation of the Act's restriction on expenditures." 367 U.S. at 771.

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[2] *See Railway Clerks v. Allen*, 373 U.S. 113, 120 (1963) (quoting this passage from *Street*); *Ellis v. Railway Clerks*, 466 U.S. 435, 434 ("In *Machinist v. Street*, 367 U.S. 740 (1961), the Court held that the Act does not authorize a union to spend an objecting employee's money to support political causes."); *Beck*, 487 U.S. at 738 (Section 8(a)(3) of the National Labor Relations Act does not "permit a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment. . . .") & 745 ("§ 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes."). *See also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 515 (1991) ("[T]he *Street* Court construed the RLA to deny unions the authority to expend dissenters' funds in support of political causes to which those employees objected.").

Accord Allen, 373 U.S. at 122 ("no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining").

The public sector union security cases that comprised the next wave of litigation came out in essentially the same place, albeit on a constitutional rather than a statutory basis. "In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court confronted the issue whether, consistent with the First Amendment, agency-shop dues of nonunion public employees could be used to support political and ideological causes of the union which were unrelated to collective-bargaining activities." *Keller*, 496 U.S. at 9. The Court "held that while the Constitution did not prohibit a union from spending 'funds for the expression of political views . . . or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representatives,' the Constitution did require that such expenditures be 'financed from charges, dues, or assessments paid by employees who [did] not object to advancing those ideas and who [were] not coerced into doing so against their will by the threat of loss of government employment.'" *Keller*, 496 U.S. at 9, quoting *Abood*, 431 U.S. at 235-236.

2. The *Street/Abood* rulings—delineating the legal limitation imposed on unions in expending agency fees payable by objectors—generate the following additional legal question: what must a union that is entitled to collect agency fee payments from an objecting nonmember do to assure, on the one hand, that the objection receives a proper response and the objector is not required to finance the unions "non-collective bargaining" activities, and to also assure, on the other hand, that the objector pays his fair share of the union's "collective bargaining" costs as contemplated by the national labor policy permitting union security agreements.

The Court has devoted the most mature deliberation to that question, considering a range of alternatives prior to arriving at the answer vouchsafed in *Hudson*. In so doing, the Court has recognized the need "[t]o attain the appropriate reconciliation between majority and dissenting interests," *Street*, 367 U.S. at 773, and has been guided by the well proved axiom that "resort to litigation to settle the rights of labor organizations and employees very often proves unsatisfactory," *Allen*, 373 U.S. at 123-124.

Just two years after *Street*, the *Allen* Court suggested that "[i]f a union agreed upon a formula for ascertaining the proportion of political expenditures in its budget, and made available a simple procedure for allowing dissenters to be excused from having to pay this proportion of moneys due from them under the union-shop agreement, prolonged and expensive litigation might well be averted." 373 U.S. at 123. *See also Abood*, 431 U.S. at 240 & 242 (echoing this suggestion in the public sector context).

Ellis v. Railway Clerks, supra, began the process of putting *Allen*'s suggestion to the test. The union defendant in *Ellis*, "conced[ing] that the statutory authorization of the union shop does not permit the use of [objecting fee payers'] contributions for union political or ideological activities," had "adopted a rebate program covering such expenditures," and "[t]he Court of Appeals for the Ninth Circuit . . . held that the union's rebate plan was [legally] adequate." 466 U.S. at 439-440 & 440-441. This Court disagreed.

The *Ellis* Court emphasized that the rebate plan there "allowed the union to collect the full amount of a protesting employee's dues, use part of the dues for objectionable purposes, and only pay the rebate a year later." 466 U.S. at 441. That being so, the Court ruled that such a "rebate scheme reduces but does not eliminate the statutory violation." *Id.* at 444.

In so ruling, the *Ellis* Court recognized that where a union has adopted such a scheme "[t]he cost to the employee is, of course, much less than if the money was never returned," and that "[t]he harm would be reduced [even further] were the union to pay interest on the amount refunded. . . ." 466 U.S. at 444. But those reductions in the harm to the objector do not suffice to meet the *Street/Abood* legal requirements because "[e]ven then the union obtains an involuntary loan for purposes to which the employee objects." *Id.*

Having said that much as to the deficiencies of the *Ellis* rebate plan, the Court added that "there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union." 466 U.S. at 444. And, "[g]iven the existence of acceptable alternatives," the Court held that "the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Id.*

Ellis thus set the stage for the *Hudson* case. In *Hudson*, the Chicago Board of Education agreed to deduct from the pay of nonmembers represented by the Chicago Teachers Union ("CTU") "proportionate share payments" equal to 95% of normal Union dues and to transmit these fees to the CTU. 475 U.S. at 295. "Union officials computed the 95% fee" by identifying "expenditures unrelated to collective bargaining and contract administration" and "divid[ing] this amount by the Union's income for the year. . . ." *Id.* "[A] nonmember could object to the 'proportionate share' figure by writing to the Union President within 30 days after the first payroll deduction," and "[t]he objection then would meet a three-stage procedure." *Id.* at 296. The first two steps involved consideration of the objection by the CTU's Executive Committee and then by its Executive Board. *Id.* "[I]f the objector continued to protest after the Executive Board decision, the Union president would select an arbitrator from a list maintained

by the Illinois Board of Education." *Id.* "If an objection was sustained at any stage of the procedure, the remedy would be an immediate reduction in the amount of future deductions for all nonmembers and a rebate for the objector." *Id.*

Four nonmember fee payers filed suit challenging the Chicago Teachers Union's objection procedure in federal district court. 475 U.S. at 297-298. The district court sustained the procedure in all respects, and the plaintiffs appealed. *Id.* at 298. Thereafter, "[t]he Union modified its position[, and] [i]nstead of defending the procedure upheld by the District Court, it advised the Court of Appeals that it had voluntarily placed all of the dissenters' agency fees in escrow, and thereby avoided any danger that [the plaintiffs'] constitutional rights would be violated." *Id.* at 299. The court of appeals, nevertheless, held that the Union's procedure, even as modified to escrow the objectors' fee payments, did not adequately protect the fee payers' constitutional rights. *Id.* at 299-300.

This Court began by considering first "[t]he procedure that was initially adopted by the Union and considered by the District Court," and concluded that the initial procedure "contained three fundamental flaws." 475 U.S. at 304-305. "First, as in *Ellis*, a remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose." *Id.* at 305. "Second, the 'advance reduction of dues' was inadequate because it provided nonmembers with inadequate information about the basis for the proportionate share." *Id.* at 306. "Finally, the original Union procedure was also defective because it did not provide for a reasonably prompt decision by an impartial decisionmaker." *Id.* at 307. And, the Court explained that that "an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker, so long as the arbitrator's

selection did not represent the Union's unrestricted choice." 475 U.S. at 308.[3]

In sum, "the original Union procedure was inadequate because it failed to minimize the risk that nonunion employees' contributions might be used for impermissible purposes, because it failed to provide adequate justification for the advance reduction of dues, and because it failed to offer a reasonably prompt decision by an impartial decisionmaker." 475 U.S. at 309.

The Court then turned to the Chicago Teachers Union's modified procedure and noted that the CTU's "creat[ion] [of] an escrow of 100% of the contributions exacted from the [plaintiffs]" cured the first flaw by "eliminat[ing] the risk that nonunion employees' contributions may be temporarily used for impermissible purposes. . . ." 475 U.S. at 309. Nevertheless, "the procedure remain[ed] flawed in two respects," *viz.*, "[i]t does not provide an adequate explanation for the advance reduction of dues, and it does not provide a reasonably prompt decision by an impartial decisionmaker." *Id.*

Restating the foregoing points in affirmative terms, *Hudson* holds that, in the public sector, "the constitutional requirements for the Union's collection of agency

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[3] Justice White's concurring opinion, joined by the Chief Justice, stated that "if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts." 475 U.S. at 311. Although the Court's opinion did not speak directly to this point, it expressed apparent agreement with Justice White's understanding of the proper sequence for fee challenges by observing that "[t]he arbitrator's decision would not receive preclusive effect in any *subsequent* § 1983 action." *Id.* at 308 n.21 (emphasis added). On remand, the Seventh Circuit was of the view that this Court's decision clearly contemplated resort to the mandated arbitration before an objecting fee payer could challenge the union's calculation of the fee reduction in court. *Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1314 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991).

fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310.[4]

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[4] Given that the instant case arises under the Railway Labor Act, to avoid any confusion, we note that "constitutional requirements" apply to "the Union's collection of agency fees" in the public sector, *Hudson*, 475 U.S. at 310, because the union's agency shop agreement constitutes joint action with the public employer and "the actions of public employers surely constitute 'state action,'" *Abood*, 431 U.S. at 226. *See Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 939-942 (1982).

Obviously, private sector agency shop agreements cannot be considered "state action" on any joint action theory, because those agreements are between private unions and private employers not government employers.

Nor does the fact that constitutional concerns formed the backdrop of this Court's RLA decisions indicate that the Constitution governs the collection of agency fees by unions under that statute. Constitutional concerns arose with respect to the RLA, because that statute preempts state laws forbidding union security agreements, and hence, in this context, "[i]f private rights are being invaded it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." *Hanson*, 351 U.S. at 232. "Undoubtedly the [government] [i]s responsible for [its] statute," *Lugar*, 457 U.S. at 938, and, if this Court had not given a limiting construction to RLA § 2, Eleventh, the Court would have been faced with the question of whether *Congress* had acted unconstitutionally in "[t]he enactment of th[at] federal statute," *Hanson*, 351 U.S. at 232. That a limiting construction might have been necessary to save *the statute*, does *not* imply, however, that the action of railroad or air line sector private parties in negotiating union security agreements permitted by the RLA is subject to constitutional constraints. To the contrary, "action by a private party pursuant to [a] statute, without something more, [i]s *not* sufficient to justify a characterization of that party as a 'state actor.'" *Lugar*, 457 U.S. at 939 (emphasis added).

It is also worthy of note that the amorphous constitutional concerns raised by the RLA do not even come into play with respect to the National Labor Relations Act, because that statute does not preempt state laws forbidding union security agreements. *See Beck*, 487 U.S. at 761. And the general rule is that

3. The "objective" of a procedure of the kind specified in *Hudson*, then, is two-fold: first, to fully vindicate the right of objecting nonmember fee payers by "preventing compulsory subsidization of ideological activity by employees who object thereto;" and second, to do so "without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302, quoting *Abood*, 431 U.S. at 237.

A *Hudson* objection procedure meets these dual objectives by providing that the fees of objecting nonmembers will be promptly reduced on the basis of the union's calculation of its "collective-bargaining" and "non-collective-bargaining" expenditures, that the objecting fee payers will be given "sufficient information to gauge the propriety of the union's fee," and that these fee payers will have a means to preclude the union's use of the amounts "reasonably in dispute" while any challenge to the reduced fee is promptly resolved by an 'impartial decisionmaker." 475 U.S. at 306-307 & 310.

Where this procedure is in place, an objecting fee payer has *no* cognizable complaint that he is being compelled to subsidize "non-collective bargaining" union expenditures until the procedure has run its course. To the extent that the objector puts any such expenditure into reasonable dispute, that triggers the escrow of the disputed portion of his payments and prompt review of the union's calculation by an impartial decisionmaker.

By reason of the structure and design of the *Hudson* procedure, in other words, prior to the procedure's terminal point, *no* objector can be compelled to finance *any* nonchargeable union activities. Thus, so long as the

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government *inaction* in refusing to prohibit certain private conduct does *not* constitute constitutionally reviewable government action. *See Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 337-338 & n.15 (1987).

Hudson procedure works as a unified whole, the procedure serves to "eliminate the statutory violation," *Ellis*, 466 U.S. at 444—*viz.*, "the spending of [the objectors'] funds for purposes not authorized by the Act in the face of their objection," *Street*, 367 U.S. at 771. And, a union that has adopted such a procedure "should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities." *Street*, 367 U.S. at 774.

At the same time, by providing for a prompt determination by an impartial decisionmaker and thereby limiting the period of time that funds appropriately owing to the union must remain in escrow, the *Hudson* procedure—working as a unified whole—accommodates the objectors' interests "without [unnecessarily] restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Abood*, 431 U.S. at 237. *See Hudson*, 475 U.S. at 310 (recognizing the interest in limiting the escrow requirement). And, the *Hudson* procedure also serves to safeguard a union that has taken the proper steps "to prevent compulsory subsidization of ideological activity by employees who object thereto," 475 U.S. at 237, from having the dues and fees properly payable to the organization eroded in financing the defense of unnecessary objecting fee payer litigation.

By treating completion of the *Hudson* procedure as a matter entirely within the discretion of the objecting fee payer, the decision below permits an objector who short-circuits the procedure to proceed in court on the fiction

[5] The costs of defending such litigation can easily consume the union's agency fee receipts. In such litigation, the union "bears the burden of proving [the] proposition [of political to total union expenditures," and such proof entails "difficult accounting problems. . . ." *Allen*, 373 U.S. at 122. What's more, the union is likely to have to re-prove the proportion for each fiscal year, "since the proportion of the union budget devoted to political activities may not be constant." *Id.*

that the union is compelling him to subsidize nonchargeable union activities, when in fact this "forced subsidization" is the result of his voluntary decision to disregard a straightforward means of preventing any such use of his fee payments. Permitting the fabrication of such premature lawsuits, we submit, cuts deeply against the interests served by the *Hudson* rules.

And, of course, the decision below completely ignores the union's interest in being able to commit its dues and fee income to defraying the costs of its collective bargaining function, and to do so reasonably promptly and in a manner that spreads those costs equally among all represented employees.

On both scores, the court of appeals' decision is out of line with the general course of this Court's agency fee jurisprudence and at odds with the logic of the Court's *Hudson* decision.

4. It is also very much to the point that requiring that the *Hudson* "arbitration procedure be exhausted before [an objector may] resort[] to the courts." *Hudson*, 475 U.S. at 311 (White, J., concurring), achieves an "appropriate reconciliation between majority and dissenting interests," *Street*, 367 U.S. at 773, by minimizing the possibility of "prolonged and expensive litigation," *Allen*, 373 U.S. at 123.

In the first place, allowing an arbitrator to review an objector's challenge to the fee calculation "might lead to nonjudicial resolution" of the dispute either by "offer[ing] him a favorable settlement" or by "demonstrat[ing] that his underlying . . . claim was without merit." *Clayton v. Automobile Workers*, 451 U.S. 679, 689 (1981). *See Communications Workers v. AT&T*, 40 F.3d 426, 432 (D.C. Cir. 1994) ("[T]he exhaustion requirement may render subsequent judicial review unnecessary in many ERISA cases because a plan's own remedial procedures will resolve many claims."). To the extent the arbitrator

rules in the objector's favor and his escrowed funds are turned over to him, the objector secures complete vindication. The union will have never used those funds, and the objector will be compensated for the temporary deprivation by the accumulated interest. To the extent the arbitrator rules against the objector, the process of requiring the union to prove the correctness of its calculation and of securing the arbitrator's explanation of why she accepted the union's calculation as proper and its supporting proof as sufficient, may satisfy the objector that his claim is without merit.

Even if the arbitration process does not satisfy the objector's claim, the record established in the arbitration and the arbitrator's award are likely to be of assistance to a trial court in managing a lawsuit challenging the calculation. *See McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) ("[E]ven where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context."). This is true, even if "[t]he arbitrator's decision would not receive preclusive effect in any subsequent . . . action." *Hudson*, 475 U.S. at 308 n. 21, citing *McDonald v. West Branch*, 466 U.S. 284 (1984).

"Where an arbitral determination gives full consideration to an employee's [statutory or constitutional] rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record." *McDonald*, 466 U.S. at 293 n. 13, quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n. 21 (1974). *See also Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743-744 n. 22 (1981).

Indeed, the American Arbitration Association Rules for Impartial Determination of Union Fees, incorporated

into the objection procedure of the Air Line Pilots Association in this case, go far to insure that the arbitration decisions will be entitled to substantial weight in subsequent litigation. In the first place, the AAA itself selects the arbitrator to decide any particular dispute from among "a special panel of arbitrators experienced in employment relations." Pet. App. 2a. Such arbitrators are familiar with the practicalities of collective bargaining and contract administration, and their views as to what activities are unrelated to collective bargaining will accordingly be entitled to respectful consideration. And, the AAA Rules insure that the arbitrator's views in this regard will be fully articulated by providing that the award "shall be accompanied by a written explanation of the arbitrator's decision." Jt. App. 93.

Moreover, the AAA Rules provide for the compilation of "an adequate record." *McDonald*, 466 U.S. at 293 n. 13. Under the Rules, "[t]he burden is upon the union to justify whatever fees are being disputed." Jt. App. 85. In addition, the Rules state that "[t]he parties . . . shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute" and that "[t]he arbitrator shall determine when sufficient evidence has been submitted for an understanding and determination of the dispute[,] [a]t which point, the arbitrator may declare the hearings closed." *Id.* at 90 & 91.

This Court has assigned to the union "the burden of proving" the validity of the fee calculation because "the union[] possess[es] the facts and records from which the proportion of political to total union expenditures can reasonably be calculated. . . ." *Allen*, 373 U.S. at 121. As in other contexts where the burden of producing evidence is assigned to a defendant, this allocation of "evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to th[e] ultimate question." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248,

253 (1981). The AAA Rules further this process by allowing the arbitrator to keep the record open until she is satisfied that the union has produced all available evidence "sufficient" and "necessary to an understanding and determination of the dispute" over the fee. Jt. App. 90-91. And, once again, the Rules require "a written explanation" of why the arbitrator found the evidence sufficient to justify the fee or insufficient for that purpose. Jt. App. 93.

The arbitrator's decision, together with the record on which it is based, could thus provide a proper basis for resolving a subsequent court case on summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Alternatively, the arbitration award and record could serve as the basis for managing the discovery process and the presentation of evidence at trial. *See* Pet. App. 20a. The union's evidence in support of its calculation will have been assembled in the arbitration record and the arbitrator's decision will provide a neutral review of the sufficiency of that evidence. In the face of such a record, the objecting fee payer can reasonably be required to identify in what respects the union's evidence accepted by the arbitrator is insufficient to justify the fee.

Allowing the arbitration award and record to play such a role in any subsequent litigation would encourage both the union and the objecting fee payers to treat that process seriously. As a result, the hearing before the arbitrator will be more likely to produce the sort of record and award that either will eliminate entirely subsequent litigation or will greatly assist the court in efficiently disposing of such litigation. Conversely, allowing objecting fee payers to bypass the arbitration process and bring their challenges to the fee calculation directly to court, would tend to discourage the development of procedures that could either eliminate or minimize the scope of agency fee litigation. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 656 (1965).

CONCLUSION

The judgment below should be reversed and this case should be remanded to the court of appeals for further proceedings consistent with this Court's decision.

Respectfully submitted,

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